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U.S. v. Parker: Will Those with Standing Please Stand Up

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U.S. v. PARKER: WILL THOSE WITH STANDING PLEASE STAND UP

I. INTRODUCTION

Suppose the United States Congress passed a law that required all state senates to be comprised of 25 members. This would obviously be an invasion of the state sovereignty guaranteed by the Tenth Amendment. However, who could maintain a suit to fight this law? Could the state? Could a displaced senator? Could a citizen claiming vote dilution? Would it make a difference if the state agreed? Each of these questions involves the issue of standing.

In the case of *United States v. Parker*,[1] the United States Court of Appeals for the Tenth Circuit addressed a circuit split on whether a private individual had standing to pursue a Tenth Amendment claim.[2] The preliminary issue in such a claim is whether a private individual may allege that a federal action has infringed a state's rights in violation of the Tenth Amendment, or whether the state is the only entity with standing to pursue such a claim.

This survey examines the Tenth Circuit's approach to private standing in suits challenging federal action under the Tenth Amendment, as demonstrated by *United States v. Parker*. Part II provides a general background on the Tenth Amendment and the issue of standing. Part III considers the precedential backdrop, including past Tenth Circuit decisions and holdings from other circuits. Part IV will examine the *Parker* case, including the facts and the holding. Finally, Part V will analyze the holding of the Tenth Circuit Court of Appeals in that case.

II. BACKGROUND

A. *Tenth Amendment*

The Tenth Amendment reserves for the states any power "not delegated to the United States"[3] nor "prohibited . . . to the states."[4] Courts have interpreted this amendment as the manifestation of the framers' intent to maintain the dual sovereignty of federal and state governments.[5] The powers granted to these sovereigns are only over people, not over each other.[6] In general, the federal government cannot "commandeer"

1. 362 F.3d 1279 (10th Cir. 2004).
2. *Parker*, 362 F.3d at 1284-85.
3. U.S. CONST. amend. X.
4. *Id.*
5. Printz v. United States, 521 U.S. 898, 918 (1997).
6. *Printz*, 521 U.S. at 920.

state legislatures.[7] When such commandeering occurs, a state will usually bring a challenge to the federal action, claiming that it improperly infringed upon an issue of local concern.[8] Other times, however, private plaintiffs have sought to vindicate these rights.[9]

In furtherance of the dual sovereignty principle, neither sovereign can agree to the relinquishment of any sovereign power.[10] In the hypothetical presented in the introduction, the law mandating the structure of the state senate is unconstitutional, even if the state agreed to its terms.

Under the Articles of Confederation, the national government generally lacked the power to regulate individuals. In fact, the Confederate government only had "greatly restricted" power over the states.[11] In contrast, the Constitution created a federal government that acted directly upon its citizens.[12] Also in contrast to the Articles of Confederation, the new Constitution did not retain for the states any power not "expressly" delegated to the federal government.[13] This left room under the new constitution for incidental and implied powers.

The framers of the Constitution, in particular James Madison, created the Tenth Amendment to alleviate the anti-federalists' fears that the federal government may encroach on the sovereignty of the states in an exercise of legitimate power.[14] In fact, the Tenth Amendment was probably necessary to convince the states to ratify the Constitution.[15] Before the Constitution, the people vested power in the states.[16] The Constitution, with the states' consent as evidenced by the ratifications, granted some of these powers to the new federal government.[17] Since the federal government is one of "enumerated powers," it is necessarily restricted to those powers "delegated to the United States."[18] The states retained, and continue to retain, all other powers.

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7. New York v. United States, 505 U.S. 144, 161 (1992).
8. Ara B. Gershengorn, *Note: Private Party Standing To Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1066 [hereinafter, Gershengorn].
9. *Id.*
10. *New York*, 505 U.S. at 182.
11. Lane County v. Oregon, 74 U.S. 71, 76 (1869).
12. *Oregon*, 74 U.S. at 76.
13. McCulloch v. Maryland, 17 U.S. 316, 404 (1819).
14. Gershengorn, *supra* note 8, at 1083-84; United States v. Darby, 312 U.S. 100, 124 (1941).
15. Justice Powell stated:

> [E]ight States voted for the Constitution only after proposing amendments to be adopted after ratification. All eight of these included among their recommendations some version of what later became the Tenth Amendment. So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 569 (1985) (Powell, J., dissenting) (citations omitted).
16. *McCulloch*, 17 U.S. at 403.
17. *Id.* at 403-04.
18. U.S. CONST. amend. X.

Until the twentieth century, courts treated the Tenth Amendment as a "truism" that did not perform any "substantive independent work."[19] This is illustrated by *United States v. Darby*,[20] where the Court stated:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . . or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.[21]

The Tenth Amendment made a brief jurisprudential appearance in 1976 with the *National League of Cities v. Usery*[22] decision. In *Usery*, the Court held that the Fair Labor Standards Act, which set minimum wage standards, would violate the Tenth Amendment if applied to the states. The *Usery* Court held that the Tenth Amendment was a limitation on the Article I powers of Congress, which in this case was the Commerce Power.[23] This was the first substantive use of the Tenth Amendment. Subsequent cases followed the *Usery* reasoning until 1985.[24]

In 1985, Justice Blackmun, having concurred in *Usery*, wrote the majority opinion for the Court in *Garcia v. San Antonio Metropolitan Transit Authority*.[25] In *Garcia*, Blackmun rejected the substantive role of the Tenth Amendment. *Garcia* again involved the Fair Labor Standards Act, this time applied to a municipal transit authority. Rejecting the Tenth Amendment as a limitation on federal power, the Court held that "procedural safeguards," such as the political process was the only protection of state sovereignty.[26] Thus, the Tenth Amendment was again relegated as a "truism" with no substantive power.

The Tenth Amendment reappeared again in 1992, in *New York v. United States*.[27] In the *New York* decision, the Court held that the Tenth Amendment prevented the federal government from "commandeering"

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19. Gershengorn, *supra* note 8, at 1068.

20. 312 U.S. 100 (1941).

21. Gershengorn, *supra* note 8, at 1068 (quoting United States v. Darby 312 U.S. 100, 124 (1941)).

22. 426 U.S. 833 (1976).

23. *Id.* at 845. Article I, § 8 lists the powers of the legislative branch, such as the power to lay taxes, regulate commerce, and declare war. U.S. CONST. art I, § 8.

24. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n., 452 U.S. 264, 287-88 (1981) (analyzing whether the Surface Mining Control and Reclamation Act was a Tenth Amendment violation); FERC v. Mississippi, 456 U.S. 742, 758 (1982) (analyzing whether the Public Utility Regulatory Policies Act was a Tenth Amendment violation); EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (analyzing whether the Age Discrimination in Employment Act was a Tenth Amendment violation).

25. 469 U.S. 528 (1985).

26. KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 182-83 (15th ed. 2004).

27. 505 U.S. 144 (1992).

state legislatures.[28] Although the commerce power authorized the challenged act in *New York*, it interfered with the state's exercise of its sovereignty. While the facts of the case are inconsequential for purposes of this paper, *New York* is interesting because it marks the re-emergence of the Tenth Amendment as a substantive limitation on federal action. The Court has reaffirmed the reasoning set forth in *New York* in several subsequent decisions.[29]

Essentially, the Court's most recent interpretations of the Tenth Amendment hold that it is a substantive right protecting the sovereignty of the states. It does so by limiting the federal government to only those powers enumerated by the United States Constitution. Further, it limits the federal government's legitimate exercise of power when that exercise would interfere with a state's sovereignty.

B. Standing

Generally, the question of standing is simply, "Do we have the correct plaintiff for this case?" Traditionally, courts analyze a plaintiff's standing to bring his claim independent of the merits of the plaintiff's claim.[30] The United States Constitution imposes the requirement of standing through the "cases" and "controversies" clauses.[31] These clauses require that parties have "alleged such a personal stake in the outcome of the controversy"[32] that they present the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[33] To insure this personal stake, Article III courts (the only courts affected by the "cases" and "controversies" requirements) have, in addition, imposed a prudential requirement that will not allow a party to "rest his claim to relief on the rights of another who does not press those rights."[34] In other words, if A suffers an injury, B cannot bring a lawsuit on A's behalf.[35] Furthermore, when determining whether a party has standing, the court will apply the summary judgment standard and accept as true all material allegations of the complaint, and construe the complaint in favor of the complaining party.[36]

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28. *New York*, 505 U.S. at 156.
29. *See Printz*, 521 U.S. at 898; Reno v. Condon, 528 U.S. 141 (2000).
30. Flast v. Cohen, 392 U.S. 83, 99 (1968).
31. U.S. CONST. art. III § 2.
32. Baker v. Carr, 369 U.S. 186, 204 (1962).
33. *Baker*, 369 U.S. at 204.
34. Mountain States Legal Found. v. Costle, 630 F.2d 754, 761 (10th Cir. 1980); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 80 (1978).
35. This ignores some *jus tertii* assertions that allow this in a few specific situations, such as a parent representing a child's interest. *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).
36. Warth v. Seldin, 422 U.S. 490, 501 (1975).

Prudential requirements are generally attributed to Justices Brandeis and Frankfurter.[37] Both of these justices advocated judicial deference to the democratic process by invoking justiciability doctrines such as ripeness,[38] reviewability[39] and standing[40] to avoid reviewing legislative actions.

In 1992, the Court offered a succinct statement of the standing requirement in *Lujan v. Defenders of Wildlife*:[41]

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[42]

Justice Scalia stated that these requirements are imposed by the "case and controversy" requirement of Article III. However, he also admits, "some of its elements express merely prudential considerations."[43] One of the prudential considerations is the third-party standing bar, as articulated by the "injury" requirement. The Constitution does not require that the plaintiff be the injured party. The case and controversy requirement would be satisfied simply if there were an injury, regardless of who the plaintiff is. Therefore, the third-party standing bar is a prudential requirement.

As a side note, because the third-party standing bar is a prudential requirement, Congress can bypass that requirement statutorily, such as in *qui tam* statutes[44] and "citizen suit statutes."[45] However, such Congres-

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37. Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992) [hereinafter Sunstein].

38. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (case dismissed for, among other reasons, failure to exhaust administrative remedies).

39. *See* FCC v. CBS of Cal., 311 U.S. 132, 136 (1940) (case dismissed for lack of reviewability).

40. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154–55 (1951) (Frankfurter, J., concurring); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341–45 (1936) (Brandeis, J., concurring).

41. 504 U.S. 555 (1992).

42. *Lujan*, 504 U.S. at 560–61 (citations omitted).

43. *Id.* at 560.

44. *See* Sunstein, *supra* note 37, at 175 (discussing the history of *qui tam* suits in American jurisprudence). *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 388 n.1 [hereinafter Caminker] (The phrase "*qui tam*" is shorthand for "*qui tam pro domino rege quam pro se imposo sequitur*," interpreted as "who brings the action as well for the king as for himself"). Usually, a *qui tam* statute grants an individual the right to file suit for enforcement of that statute, even when the individual has no personal interest or injury, beyond the "bounty" offered by

sional waiver to the third-party standing bar is outside the scope of this survey, and will not be addressed here.

III. PRECEDENT

A. Supreme Court

One of the early decisions on the issue of "private attorneys general"[46] litigating Tenth Amendment violations was *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*[47] In 1933, the United States Congress passed the Tennessee Valley Authority Act.[48] Under this Act, the Tennessee Valley Authority ("*Tennessee*") was to erect a series of dams on the Tennessee River to control flooding and produce power.[49] Several power companies, including the Tennessee Electric Power Company, filed suit seeking to have *Tennessee* enjoined from producing power and thereby competing with them.[50] One of the plaintiffs' contentions was that the Act violated the Tenth Amendment because it "result[ed] in federal regulation of the internal affairs of the states"[51] and was outside of the enumerated powers of the federal government. The Court rejected this contention by holding that "[t]he sale of government property [power] in competition with others is not a violation of the Tenth Amendment."[52] The Court further stated that "there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment."[53]

Several taxpayer cases have also suggested that rights under the Tenth Amendment belonged only to the states. In *Frothingham v. Mellon*,[54] the plaintiff alleged that the Maternity Act of 1921[55] exceeded

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the suit. *Id.* at 345. *See also* Joan H. Krause, *Health Care Providers And The Public Fisc: Paradigms Of Government Harm Under The Civil False Claims Act*, 36 GA. L. REV. 121, 125 (2001) (discussing contemporary *qui tam* actions under the Civil False Claims Act, 31 U.S.C. §§ 3729–3733 (1994)).

45. Sunstein, *supra* note 37, at 223-25 (discussing the viability of citizen suits after *Lujan*). A "citizen suit" statute grants an individual the right to file suit for enforcement of that statute when the individual's injury or interest is representative of the public injury. Caminker, *supra* note 44, at 345. Compare this with the *qui tam* statutes. *Id.*

46. Caminker, *supra* note 44, at 343 ("Individuals bringing suits of either [*qui tam* or citizen] type are often called 'private attorneys general' . . . .").

47. 306 U.S. 118 (1939).

48. 73 Cong. Ch. 32, 48 Stat. 58 (1933).

49. *Id.*

50. Gershengorn, *supra* note 8, at 1073.

51. *Tennessee*, 306 U.S. at 136.

52. *Id.* at 144.

53. *Id.*

54. 262 U.S. 447 (1923). This case was decided together with a companion case Massachusetts v. Mellon, 262 U.S. 447 (1923), so some references refer to this case name. The *Frothingham* case involved an individual's standing, whereas the *Mellon* case, based on the same controversy, involved the State's standing on the exact same issue. *Id.* at 478–79. Since this article is concerned with individual standing, I will ignore the *Mellon* companion case.

55. 67 Cong. Ch. 135, 42 Stat. 224 (1921).

Congress' "enumerated powers" under Article I, §8. The Maternity Act authorized appropriations to reduce infant and maternal mortality.[56] The plaintiff contended that the Act "invades the local concerns of the State, and is a usurpation of power."[57] The Court held that the plaintiff did not have standing because she was seeking to enforce the legislative power of the state.[58]

Later, in *Flast v. Cohen*,[59] the Supreme Court again implied that only a state had standing to assert a Tenth Amendment violation.[60] In *Flast*, the plaintiff sought review of the trial court's dismissal of his case for lack of standing.[61] In the trial court, the plaintiff had alleged that the Elementary and Secondary Education Act of 1965[62] violated the Establishment and Free Exercise clauses of the First Amendment[63] because it provided federal funds for religious schools.[64] The Court held that unlike Ms. Frothingham, Mr. Flast had standing. The Court held that while Ms. Frothingham was asserting the state's rights, Mr. Flast was, in fact, asserting personal rights.[65] Therefore, Mr. Flast was not asserting "third party" rights.

Given the holdings in *Flast* and *Frothingham*, one might conclude that a private individual would only have standing to pursue a case asserting private rights, not state's rights. In essence, a private individual can only pursue a Tenth Amendment claim when the contested federal action violates a personal right, not the rights conferred merely by the individual's status as a taxpayer or a citizen of his or her state.

However, several cases imply that an individual's right to pursue a Tenth Amendment claim does exist.[66] The Court, in deciding some of the New Deal era cases on the merits, must have granted the parties standing by implication,[67] because a lack of standing would have resulted in the Court's dismissal of the case *sua sponte*.[68] For example, in *Helvering v. Davis*,[69] the plaintiff claimed that the Social Security program was an invasion of the state's Tenth Amendment rights.[70] In reject-

56. *Frothingham*, 262 U.S. at 479.
57. *Id.* at 480.
58. *Id.*
59. 392 U.S. 83 (1968).
60. *Flast*, 392 U.S. at 126.
61. *Id.* at 106.
62. Pub. L. No. 89-10, 79 Stat. 27 (1965).
63. *Flast*, 392 U.S. at 86–87.
64. *Id.* at 85–86.
65. Gershengorn, *supra* note 8, at 1073-74.
66. *See, e.g.*, Helvering v. Davis, 301 U.S. 619, 646 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937).
67. Atlanta Gas Light Co. v. U. S. Dep't of Energy, 666 F.2d 1359, 1368 (11th Cir. 1982).
68. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).
69. *Helvering*, 301 U.S. at 619.
70. *Id.* at 637.

ing this contention, the Court granted standing by implication by deciding the case on the merits.[71]

In *Duke Power Co. v. Carolina Envtl. Study Group*,[72] the Court noted that there is a prudential limitation whereby "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[73] In *Lujan v. Defenders of Wildlife*,[74] the Supreme Court stated that this prudential limitation, while not a bar *per se*, is a severe obstruction for a plaintiff.[75] The Court noted that when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[76]

The Court dealt with an individual's right to act as a private attorney general in two recent cases. The first was *Lujan*.[77] In 1978, the Fish & Wildlife Service ("FWS") issued an interpretation of the Endangered Species Act.[78] In 1983, the FWS reversed its interpretation.[79] The Defenders of Wildlife then filed suit seeking the court to enjoin the FWS to reinstate the earlier interpretation.[80] The Supreme Court first noted that when the plaintiff is the subject of the legislation, there is "ordinarily little question that the action or inaction has [affected him]," and that he would therefore have standing.[81] After noting that the subject of the legislation was the protection of the endangered species and not the protection of the plaintiffs, the Court therefore stated that the plaintiffs must present evidence that one of the members of the Defenders of Wildlife would "be 'directly' affected."[82] In other words, the plaintiffs would have to show that they had a personal injury or interest in the case. Finding that none of the plaintiffs had a sufficient injury or interest in the case, the Supreme Court dismissed the case for lack of standing. In a curiously worded opinion by Justice Scalia, the Court stated that "[t]he [plaintiff's] profession of an 'intent' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough [to qualify as an injury]."[83]

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71. *See id.* at 640.
72. 438 U.S. 59 (1978).
73. *Duke Power*, 438 U.S. at 80.
74. *Lujan*, 504 U.S. at 555.
75. *Id.* at 562; Gershengorn, *supra* note 8, at 1074.
76. *Lujan*, 504 U.S. at 562.
77. *Id.* at 555.
78. *Id.* at 558.
79. *Id.* at 558–59.
80. *Id.* at 559.
81. *Id.* at 561–62.
82. *Id.* at 563.
83. *Id.* at 564; Justice Kennedy, joined by Justice Souter, offered a foreshadowing of the Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000), case by stating that a

Compare *Lujan* with *Friends of the Earth v. Laidlaw Environmental Services*.[84] In *Laidlaw*, the plaintiffs sought a Court order compelling Laidlaw to comply with the Clean Water Act.[85] The plaintiffs submitted affidavits stating that the river was currently unusable for recreation because Laidlaw was polluting it.[86] The Court held that, unlike the plaintiffs in *Lujan*, the violation of the legislation created a sufficient nexus and "directly affected [the plaintiffs'] recreational, aesthetic, and economic interests" which could not be "equated with the speculative 'some day' intentions to visit endangered species halfway around the world that we held insufficient to show injury in [*Lujan*]."[87] These cases seem to imply that only a "sufficient nexus" between the legislation and the alleged injury could overcome the third-party prudential bar. Although *Lujan* and *Laidlaw* deal with non-Tenth Amendment standing, they are the most recent cases decided by the Supreme Court on the general issue of standing.

B. Circuit Split

The federal courts in several circuits are split on the issue of whether a private individual has standing to pursue a Tenth Amendment violation claim.[88] The Supreme Court granted *certiorari* to address this precise point in *Pierce County v. Guillen*.[89] However, the Court decided the case on other grounds and left the standing question for another day.[90]

Several courts, including the United States Court of Appeals for the Tenth Circuit,[91] the United States District Court for the District of Vermont,[92] and the United States District Court for the Eastern District of Louisiana[93] have all rejected "private attorney general" standing. Generally, these courts have interpreted the Tenth Amendment as protecting a state's rights, not an individual's rights, as declared in *Tennessee*.[94]

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nexus theory in different circumstance would be enough to grant standing. *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring).

84. 528 U.S. 167 (2000).

85. *Laidlaw*, 582 U.S. at 177.

86. *Id.* at 184.

87. *Id.*

88. *Compare* Mountain States Legal Found. v. Costle, 630 F.2d 754, 761 (10th Cir. 1980) (holding that a private individual *does not* have standing to pursue Tenth Amendment claims), *with* Gillespie v. City of Indianapolis, 185 F.3d 693, 703–04 (7th Cir. 1999) (holding that a private individual *does* have standing to pursue Tenth Amendment claims).

89. 537 U.S. 129 (2003).

90. *Guillen*, 537 U.S. at 148 n.10.

91. *Costle*, 630 F.2d at 761.

92. Vermont Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355, 371 (D. Vt. 1998).

93. Gaubert v. Denton, 1999 U.S. Dist. LEXIS 8207 (E.D. La. May 28, 1999), *aff'd*, 210 F.3d 368 (5th Cir. 2000).

94. *Tennessee*, 306 U.S. at 144 ("the appellants, absent the states or their officers, have no standing in this suit to raise any question under the amendment").

These courts have also heavily relied on the prudential third-party bar set forth in *Duke Power*.[95]

In *Mountain States Legal Foundation v. Costle*,[96] a plaintiff challenged a provision of the Clean Air Act[97] under which the Environmental Protection Agency had the authority to approve or disapprove Colorado's clean air policies.[98] In dismissing the case for lack of standing, the Tenth Circuit cited *Duke Power* and held that "[o]nly the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment."[99] The Court also noted that the Colorado Supreme Court had previously held that "[u]nless a statute provides otherwise, the attorney general has the exclusive right to represent the state in actions to enforce its interests."[100] In this case, not only did the Attorney General of Colorado not wish to enforce Colorado's interests, he, to the contrary, intervened and held a position that was at odds to the plaintiffs' position.[101]

In reaching a similar conclusion in *Vermont Assembly of Home Health Agencies, Inc. v. Shalala*,[102] the Vermont District Court relied on *Tennessee* and found that the Court of Appeals for the Second Circuit had only extended the right to maintain a Tenth Amendment suit to municipalities, but not to individuals.[103] The plaintiff contended that the Balanced Budget Act of 1997[104] was unconstitutional because the Medicare reimbursement scheme interfered with the Vermont's health care policy.[105] In dismissing the case for lack of standing, the court noted that although the State of Vermont filed an *amicus brief* in support of the plaintiff's position, the state did not join the lawsuit.

Finally, in *Gaubert v. Denton*,[106] the Eastern Louisiana District court relied on both *Shalala* and *Costle* in finding that a plaintiff could not pursue a Tenth Amendment claim.[107] When Mr. Gaubert was involved in a traffic accident, he filed suit against the State of Louisiana in state court, claiming that the state had negligently maintained the road.[108] Mr. Gaubert requested road safety data compiled by the State of Louisiana as required by the Federal Highway Safety Act ("FHSA").[109] The

95. *Duke Power*, 438 U.S. at 80; *see supra* note 73 and accompanying text.
96. *Costle*, 630 F.2d at 754.
97. 42 U.S.C. § 7401 (2004).
98. *Costle*, 630 F.2d at 759.
99. *Id.* at 761.
100. *Id.* at 763.
101. *Id.* at 761.
102. *Shalala*, 18 F. Supp. 2d at 371.
103. *Id.*
104. 42 U.S.C. § 1395x (1997).
105. *Shalala*, 18 F. Supp. 2d at 358.
106. 1999 U.S. Dist. LEXIS 8207, at *1 (E.D. La. May 28, 1999).
107. *Gaubert*, 1999 U.S. Dist. LEXIS 8207, at *2.
108. *Id.*
109. 23 U.S.C. § 401 (2004).

state refused to release the data based on sections of the FHSA[110] that specifically prohibited usage of the safety data as evidence. Since Mr. Gaubert challenged the constitutionality of a portion of the FHSA, the state court stayed the case and referred the constitutionality question to the federal court.[111]

Mr. Gaubert filed suit in federal court claiming that since the FHSA exceeded the government's enumerated powers, it was an invasion of state sovereignty and a violation of the Tenth Amendment.[112] The federal court, relying on *Shalala* and *Tennessee*, stated that Mr. Gaubert could not maintain the suit against the federal government.[113] The court also noted that, similar to *Costle*, the state assumed a position contrary to the plaintiff's.

The courts in each of these holdings have impliedly adopted the *Tennessee* position that the Tenth Amendment only protects the rights of states, not the rights of individuals.[114] These cases stand for the proposition that a private plaintiff cannot represent the state's interest in a Tenth Amendment claim, even when there is an "identity of interest" between the plaintiff and the state.

However, the holdings of these courts are at odds with decisions made by the United States Court of Appeals for the Eleventh Circuit,[115] the United States Court of Appeals for the Seventh Circuit,[116] and the United States District Court for the Western District of North Carolina.[117] As opposed to the previously mentioned cases, these courts allowed the "private attorney general" standing by allowing any "injury or threatened injury"[118] to overcome the third-party standing bar. These courts also rely on the assertion of individual rights in pursuing the Tenth Amendment claim,[119] in keeping with the *Flast*[120] and *Frothingham*[121] line of cases. It is also noteworthy that these courts have allowed any "injury or threatened injury" to create the nexus advocated by Justice Kennedy in his concurring *Lujan* opinion and in the *Laidlaw* decision.[122]

In the Seventh Circuit case of *Gillespie v. City of Indianapolis*,[123] the plaintiff contended that Gun Control Act of 1968[124] unconstitution-

110. 23 U.S.C. §§ 402(k), 409 (2004).
111. *Gaubert*, 1999 U.S. Dist. LEXIS 8207, at *2.
112. *Id.* at *7.
113. *Id.* at *13–14.
114. *See supra* note 47 and accompanying text.
115. Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992).
116. *See* Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999).
117. Gilliard v. Kirk, 633 F. Supp. 1529, 1549 (W.D.N.C. 1986), *rev'd on other grounds sub nom.* Bowen v. Gilliard, 483 U.S. 587 (1987).
118. *Kemp*, 965 F.2d at 1034.
119. *Gillespie*, 185 F.3d at 703.
120. *See supra* note 59.
121. *See supra* note 54.
122. *See supra* note 83.
123. 185 F.3d 693 (7th Cir. 1999).

ally prevented him from carrying a gun.[125] Since he had been convicted of domestic violence, Gillespie could not carry a gun, which caused him to lose his job as a police officer.[126] Gillespie contended that the statute dictated to states as to how it can select members of its militia.[127] In doing so, Gillespie claims that the federal government was "compelling state officers to implement a federal statute and by intruding upon areas of traditional state sovereignty in violation of the Tenth Amendment."[128] Holding that Gillespie had standing to pursue the Tenth Amendment claim, the Seventh Circuit stated that "as *New York* explains, the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals."[129] Therefore, Gillespie could assert that the federal government violated his personal rights when it violated the Tenth Amendment.[130] Although Gillespie lost on the merits, the Court did grant him standing.[131]

The Eleventh Circuit, on the other hand, reached the same conclusion in *Atlanta Gas Light Co. v. U. S. Dep't of Energy*,[132] but reached it through different reasoning. In *Atlanta Gas*, the Court tried to modernize the Supreme Court Tenth Amendment standing precedent by discerning modern trends. The court held that "under *Duke Power*, the petitioners may make constitutional objections based on any of [a federal Act's] provisions so long as they show the requisite injury in fact and its causal relation to the action in question."[133] Although this approach seems incompatible with cases such as *Frothingham* and *Tennessee*, the Court interpreted the New Deal era "standing by implication" cases discussed above as a modern trend, which suggest how the Supreme Court would rule should it face the issue.[134]

Finally, the District Court case of *Gilliard* also allowed a private plaintiff standing; however, this court's reasoning follows *Flast* and *Frothingham*.[135] *Gilliard* was filed on behalf of children affected by an amendment to Aid to Families with Dependent Children ("AFDC"). This amendment required child support payments to be included as family income, which reduced the AFDC entitlement. The suit alleged that the AFDC amendments invaded state's domestic relations law, which the

124. 18 U.S.C.S. § 922 (1968).
125. *Gillespie*, 185 F.3d at 697.
126. *Id.*
127. *Id.* at 700.
128. *Id.*
129. *Id.* at 703.
130. *Id.* Some of the cases on Second Amendment make an assumption that the Second Amendment guarantees personal rights. For example, the Supreme Court has held that the Second Amendment grants the right to "keep and bear arms" only when connected with the state's need to maintain a "well regulated militia." United States v. Miller, 307 U.S. 174, 178 (1939).
131. *Gillespie*, 185 F.3d at 703.
132. 666 F.2d 1359 (11th Cir. 1982).
133. *Atlanta Gas*, 666 F.2d at 1368.
134. *Id.*
135. *See supra* notes 54, 59.

Supreme Court has repeatedly recognized as a state matter.[136] The court held that although the Tenth Amendment, as a "constitutional norm," regulates relations between governments rather than the relations between governments and individuals, individuals should have standing to assert constitutional protections derived from them.[137] Since the children were, in fact, asserting personal rights, not the state's right, the court held that the private plaintiffs did have standing.[138]

While the above discussed cases have granted a private individual standing, the courts in these decisions have not specifically contradicted *Tennessee*; rather, they have found reasons why *Tennessee* should not apply. In general, these cases have actually accepted the *Tennessee* position that a private plaintiff cannot assert a state's rights. However, if the plaintiff is asserting private rights, he may pursue a Tenth Amendment claim against a federal statute.

IV. *UNITED STATES V. PARKER*[139]

A. *Facts*

On October 3, 2002, Dale Parker drove his truck onto a military installation in Utah to do some civilian contract work.[140] Because of a random, authorized search, a military policeman located a loaded weapon in Mr. Parker's truck.[141] The military police detained Mr. Parker[142] and charged him with violation of the Federal Assimilative Crimes Act ("ACA").[143] Specifically, Mr. Parker violated a Utah law[144] against carrying a loaded firearm in a vehicle or on a public street.[145] Since this violation was on federal land, the ACA required the court to apply the relevant Utah law.

Mr. Parker filed a motion to dismiss under the Second and Tenth Amendments.[146] Specifically, Mr. Parker contended that the prosecution, pursuant to the ACA, violated his right to bear arms.[147] Further, Mr. Parker claimed that the authority to regulate Second Amendment rights is a sovereign right of the state under the Tenth Amendment; therefore, the

136. *Gilliard*, 633 F. Supp. at 1549.
137. *Id.*
138. *Id.*
139. 362 F. 3d 1279 (10th Cir. 2004).
140. *Parker*, 362 F. 3d at 1280.
141. *Id.* at 1281.
142. *Id.*
143. 18 U.S.C. § 13 (2003); The purpose of the ACA is to borrow state law to fill gaps in the federal criminal law that applies on federal enclaves. United States v. Adams, 140 F.3d 895, 896 (10th Cir. 1998). The ACA thus provides "a method of punishing a crime committed on government reservations in the way and to the extent that it would have been punishable if committed within the surrounding jurisdiction." *Id.*
144. Utah Code Ann. § 76-10-505 (2003).
145. *Parker*, 362 F.3d at 1281.
146. *Id.*
147. *Id.*

ACA was unconstitutional because it allowed the United States to impede state sovereignty by prosecuting him under the Second Amendment.[148] At trial, a magistrate judge found Mr. Parker guilty and fined him $100.[149] Mr. Parker appealed to the Tenth Circuit Court of Appeals. Since Mr. Parker was contesting the constitutionality of the ACA statute, the Court of Appeals applied *de novo* review.[150]

B. Decision

After denying Parker's Second Amendment claim, the court considered his Tenth Amendment claim *sua sponte*,[151] i.e., whether Mr. Parker had standing to pursue the Tenth Amendment claim.[152] In dismissing the Tenth Amendment claim for lack of standing, the Court relied heavily on *Mountain States Legal Foundation v. Costle*.[153] In *Costle*, the Court found that because the interests of the state did not coincide with the interests of the plaintiff,[154] the plaintiff could not pursue the Tenth Amendment claim. In *Parker*, the court stated "[s]imply put, we would be hard pressed to conclude that Parker is representing Utah's interests."[155] The court also did not believe "that the Tenth Amendment is violated when the federal government acts to enforce a Utah law which is violated on a federal enclave."[156]

Ultimately, the court affirmed Mr. Parker's conviction and dismissed the Tenth Amendment claim for lack of standing. Part V of this paper will examine the reasoning behind this decision and will advocate that the court should have allowed Mr. Parker standing to pursue his Tenth Amendment claim.

V. ANALYSIS

Although the court dismissed Parker's case as essentially a frivolous claim, the issue of constitutional standing must be decided without regard to the merits of the plaintiff's underlying claim. The *United States v. Parker*[157] decision does not follow the cited precedent, nor is it reconcilable with recent decisions from other circuits. In this case, the Tenth Circuit applied precedent that was too factually specific to apply properly to this case. Further, the court cited other precedent that was neither binding, nor particularly persuasive. The court should have granted Mr.

148. *Id.*
149. *Id.*
150. *Id.*
151. Although beyond the scope of this survey, the "right to bear arms" discussion provides an interesting review of pertinent Second Amendment caselaw. *See id.* at 1282–84.
152. *Id.* at 1284.
153. *Id.* at 1285; Mountain States Legal Found. v. Costle, 630 F.2d 754 (10th Cir. 1980).
154. *Parker*, 362 F.3d at 1285; *Costle*, 630 F.2d at 754.
155. *Parker*, 362 F.3d at 1285.
156. *Id.*
157. 362 F.3d 1279 (10th Cir. 2004).

Parker standing and, subsequently, dismissed the Tenth Amendment claim on its merits.

The *Parker* court placed great emphasis on its earlier decision of *Mountain States Legal Foundation v. Costle*.[158] From *Costle*, the court first re-affirmed the "identity of interest" argument.[159] The essence of this argument is that if a "private attorney general" does not have an identical interest as that of the state in opposing the federal action, the private plaintiff cannot represent the state's interest through a Tenth Amendment action. In *Costle*, the state intervened and assumed a position contrary to the plaintiff, therefore, the Court concluded, the plaintiff did not have standing.[160] The reasoning employed by the court in *Costle* in 1980 is no longer appropriate because of the 1992 Supreme Court decision of *New York v. United States*.[161] In that case, the United States Supreme Court held that a state could not surrender its sovereign power, even by agreement.[162] Therefore, in a "private attorney general" cause of action, under the precedent of *New York*, the state's position becomes irrelevant. The proper question is whether the federal government intruded upon a state's sovereignty, not whether the plaintiff was advocating the same position that the state would have advocated.

It is also unlikely that following its decision in *New York*, the Supreme Court would hold that a state could both agree to surrender its sovereign power, and also deny the sole avenue through which a citizen might contest such a surrender of power. If a court denies individuals standing when their interests do not coincide with the state's interests, at least in the situation where the state agrees to the surrender, there is very little possibility of objecting to the Tenth Amendment violation without allowing individual, "private" objections.

However, even if we assume that *New York* did not apply, the court's finding that "we would be hard pressed to conclude that Parker is representing Utah's interests"[163] seems incorrect on its face. There seems to be an identity of interest in this case, because both Mr. Parker and Utah have an interest in preventing the federal government from violating Utah's sovereign rights. The motivation behind the interest is irrelevant. It does not matter why Mr. Parker wants to prevent the federal government from violating the Tenth Amendment; it only matters that he is representing and advancing Utah's sovereign rights. Although the court did not examine Utah's interests, it seems likely that those interests would include protection of its sovereign rights.

158. *Parker*, 362 F.3d at 1285.
159. *Id.*
160. Mountain States Legal Found. v. Costle, 630 F.2d 754, 761 (10th Cir. 1980).
161. 505 U.S. 144 (1992).
162. *New York*, 505 U.S. at 182.
163. *Parker*, 362 F.3d at 1285.

The second holding from *Costle* identified by the *Parker* court was the "sole protector" argument.[164] This argument, as delineated in *Parker*, is that "only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment."[165] This notion was derived from the Colorado Supreme Court interpretation of Colo. Rev. Stat. § 24-31-101(1)(a), which grants the Attorney General the exclusive right, in the absence of a statute providing otherwise, to represent the state in actions to protect its interests.[166] Even ignoring for a moment the possible invalidity of this holding after *New York*, this finding was too factually specific to *Costle* to apply in Mr. Parker's case. *Costle* involved Colorado statutes,[167] whereas *Parker* involves Utah law.[168] Therefore, a holding derived from Colorado law is inapplicable to a case decided under Utah law.

Another case relied on by the court in *Parker* is the *Tennessee* case.[169] As discussed previously, it is unlikely that the dictum from *Tennessee* is still applicable. In light of the *New York* decision, a blanket statement that a private citizen would not have standing in a Tenth Amendment claim is probably incorrect because the only way to prevent a state from surrendering its sovereignty is for a private citizen to file suit. Therefore, there must be some circumstances in which a private citizen could maintain a Tenth Amendment claim.

If we assume for a moment that the Seventh Circuit Court of Appeals had decided *Parker*, it is likely that it would have granted Mr. Parker Tenth Amendment standing. Following the reasoning in *Gillespie v. City of Indianapolis*,[170] the Court would probably find that Mr. Parker was asserting personal rights, similar to the assertions of Mr. Gillespie.[171] The Seventh Circuit's reasoning in *Gillespie* was that under *New York*, all rights guaranteed by the Tenth Amendment are, in fact, rights of the individual.[172]

Similarly, the Eleventh Circuit would probably also have held that Mr. Parker had standing, given the "modern trend" followed by that court.[173] Although there seemed to be some hesitancy in the Eleventh Circuit's decision,[174] it is likely that given the recent Supreme Court de-

164. *Id.*; *Costle*, 630 F.2d at 761.
165. *Parker*, 362 F.3d at 1285; *Costle*, 630 F.2d at 761.
166. State Board of Pharmacy v. Hallett, 88 Colo. 331, 296 P. 540, 541 (1931) (discussing the statutory predecessor of C.R.S. § 24-31-101).
167. *Costle*, 630 F.2d at 771.
168. *Parker*, 362 F.3d at 1280.
169. *Id.* at 1285.
170. Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999).
171. *Gillespie*, 185 F.3d at 703.
172. *Id.*
173. Atlanta Gas Light Co. v. U.S. Dep't of Energy, 666 F.2d 1359, 1368 (11th Cir. 1982).
174. The court stated, "we must initially express our uncertainty about whether the petitioners have standing to raise the Tenth Amendment question." *Atlanta Gas*, 666 F.2d at 1368; *see also* Gershengorn, *supra* note 8, at 1079.

cisions, as discussed below, regarding the Tenth Amendment and the power of states in general, the Eleventh Circuit would probably more readily grant Mr. Parker standing.

If the Supreme Court grants *certiorari* in *Parker*, it is likely that it would grant standing to Mr. Parker. The "nexus" requirement of both Justice Kennedy's concurring *Lujan* opinion and the *Laidlaw* decision is probably satisfied.[175] That is, there is likely a sufficient nexus between the alleged Tenth Amendment violation and Mr. Parker's injury. Mr. Parker's arrest—because of the federal prosecution of a state-regulated area—presents a sufficient nexus to warrant a finding that Mr. Parker has standing. Further, this nexus is even stronger than the *Laidlaw* plaintiff's inability to use the river. However, some commentators have attributed the relaxation of the standing requirement by *Laidlaw* as attributable to the unique nature of environmental issues,[176] and, therefore, it might not be appropriate in this context. However, even disregarding the environmental standing analysis, the Court would likely find that Mr. Parker did have standing based on the *New York* rationale.

Overall, the modern trend in the Rehnquist Supreme Court is to be very conscious of state sovereignty.[177] With modern cases such as *New York v. United States*,[178] *Printz v. United States*,[179] and *Reno v. Condon*,[180] there can be little question that the Rehnquist court has established a trend of promoting state sovereignty by limiting federal power.[181] In each of these cases, the Supreme Court has stressed the sovereignty of the state. Furthermore, with the reelection of President George W. Bush, it is likely that the "conservative" camp of the Supreme Court will expand with new appointments.[182]

In *Printz*, the Supreme Court considered a federal statute that attempted to direct state officers to enforce federal legislation.[183] In hold-

175. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

176. *See* Emily Longfellow, Friends of the Earth v. Laidlaw Environmental Services: *A New Look at Environmental Standing*, 24 ENVIRONS ENVTL. L. & POL'Y J. 3, 14 (2000); *See also* Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744–745 (2000).

177. Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 451 (2003) (describing the Rehnquist court's use of Tenth and Eleventh Amendment to promote state rights).

178. *New York*, 505 U.S. at 182 (finding unconstitutional a statute that tried to direct a state legislature to follow federal legislation).

179. 521 U.S. 898, 944–45 (1997) (finding unconstitutional a statute that tried to direct a state official to follow federal legislation).

180. 528 U.S. 141, 151 (2000) (rejecting a claim of an unconstitutional statute because the statute did not regulate the sovereignty of the state). The opinion includes an extensive discussion of the substantive role of the Tenth Amendment. *Id.* at 149–51.

181. Gershengorn, *supra* note 8, at 1070.

182. *See* Derek H. Davis, Mitchell v. Helms *and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1064 (2002) (analyzing then-Governor Bush's conservative appointments to the Texas Supreme Court).

183. *Printz*, 521 U.S. at 902, 935.

ing the statute unconstitutional, the Court made clear its desire to maintain the "[p]reservation of the States as independent and autonomous entities."[184] Even in *Reno*, where the Supreme Court found that a statute regulating the state's sale of driver's license information was valid,[185] the Court stressed that the statute regulated state activities;[186] it was not "seeking to control or influence" state activities.[187] The extensive discussion on the limitations of federal power by the Tenth Amendment in *Reno*[188] highlights the deference that the Rehnquist Supreme Court has given to state sovereignty. Even in the *Reno* case where the Supreme Court denied the unconstitutionality claim of a statute that imposed a burden on a state, it was careful to explain why this statute was not an imposition on the state sovereignty.[189] Given this "empowering" of the state, it is unlikely that the Supreme Court would deny Mr. Parker standing in the instant case.

If we adopt the Tenth Circuit's reasoning in the instant case, the conclusion is that the Tenth Amendment *only* protects a state's rights.[190] By declaring that only a state has standing to pursue a Tenth Amendment claim, the Tenth Circuit's interpretation would necessarily preclude an individual from pursing a Tenth Amendment claim. However, we should consider the actual text of the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[191] If we accept the Tenth Circuit's interpretation, then the clause "or to the people" from the Tenth Amendment becomes meaningless. As far back as 1803, the Supreme Court has advocated interpretations that do not nullify portions of the Constitution.[192] In fact, Chief Justice Marshall stated, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and *therefore such a construction is inadmissible*, unless the words require it."[193] However, with the *Parker* holding, the Tenth Circuit has stated that the clause "or to the people" is meaningless.[194] If, as the Tenth Circuit holds, a private individual cannot pursue a Tenth Amendment Claim,[195] then the phrase is without effect. Compare this interpretation with the Seventh Circuit's interpretation: "Gillespie, in making Tenth Amendment claims, actually is asserting his own

184. *Id.* at 928.
185. *Reno*, 528 U.S. at 143.
186. *Id.* at 150.
187. *Id.*
188. *Id.* at 148–51.
189. *Id.* at 150.
190. *Costle*, 630 F.2d at 771.
191. U.S. CONST. amend. X.
192. Marbury v. Madison, 5 U.S. 137, 174 (1803).
193. *Marbury*, 5 U.S. at 174 (emphasis added).
194. U.S. CONST. amend. X.
195. *Parker*, 362 F.3d at 1285.

rights."[196] The Seventh Circuit's interpretation gives the clause "or to the people" effect and meaning. Therefore, this interpretation is in keeping with the notion of giving effect to every clause of the Constitution, whereas the Tenth Circuit's interpretation does not.

Finally, if we look at the purpose of the structure of the Constitution, it is to protect the rights of individuals. The "dual sovereignty" principles of federalism protect the rights of citizens. It does this by avoiding the creation of a "tyranny" by preventing the accumulation of too much power in one place.[197] Since the framers specifically designed the Constitution to protect individuals, it would seem prudent to allow those individuals to object to actions that cause consolidate power where it should not be. The separation of powers protects the individual. Any violation of that separation would therefore harm the individual. Therefore, the individual should be able to advocate his own interest by being able to pursue a Tenth Amendment claim.

VI. CONCLUSION

The Tenth Circuit held that Mr. Parker was not the correct plaintiff to pursue the Tenth Amendment claim. What would have been a better conclusion is that Mr. Parker did have standing but that his Tenth Amendment claim was without merit. As the Court stated, the Tenth Amendment is not violated when the federal government merely seeks to "enforce a Utah law which is violated on a federal enclave."[198] This reasoning is appropriate for a decision on the merits, not for a dismissal for lack of standing.

Given the modern "trend" of respecting state sovereignty, the Supreme Court would likely grant standing to an individual who wished to promote state sovereignty. However, even a court that did not champion state sovereignty would probably overturn such a restrictive finding that only a state can pursue a Tenth Amendment claim, since it nullifies a clause of the constitution.

In general, it would probably be better in line with the constitutional guarantees of the Tenth Amendment, and the principles of federalism to grant private individuals standing to pursue Tenth Amendment claims individually. This is especially true where, as in *Parker*, there may be a Tenth Amendment violation, but either the state consented to it or the state is not interested in objecting to it. The ultimate inquiry should lie in whether the federal actions are constitutional, not in whether the best plaintiff is present to challenge them. Although the standing requirement is obviously a prerequisite for the "cases and controversies" requirement,

196. *Gillespie*, 185 F.3d at 703.
197. *See* THE FEDERALIST No. 28 (Alexander Hamilton), No. 51 (James Madison).
198. United States v. Parker, 362 F.3d 1279, 1285 (10th Cir. 2004).

courts should broadly grant individual standing in Tenth Amendment cases by eliminating the third-party standing bar.

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